

SOAH DOCKET NO. 582-10-2631
TCEQ DOCKET NO. 2009-1573-DIS

PETITION OF LAVON 593 LAND	§	BEFORE THE
INVESTMENT PARTNERS, L.P.	§	
FOR CREATION OF COLLIN COUNTY	§	TEXAS COMMISSION ON
WATER CONTROL AND	§	
IMPROVEMENT DISTRICT NO. 3	§	ENVIRONMENTAL QUALITY

APPLICANT’S REPLY TO EXCEPTIONS

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Lavon 593 Land Investment Partners, L.P. (“Applicant”), and files this its Reply to Exceptions in the above-referenced matter. Applicant supports the Proposal for Decision and urges the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) to grant the creation of Collin County Water Control and Improvement District No. 3 (the “District”).

I. CITY OF WYLIE

The exceptions filed by the City of Wylie (“Wylie”) merely repeat the same arguments that Wylie has already made and that the Administrative Law Judge has correctly rejected based on the record evidence. Wylie first erroneously asserts that the record does not show the cost of the facilities to be provided by the District. This argument refers to one cost figure in the entire creation application, which lists in some detail the costs that will be financed by the District. As noted in the Proposal for Decision, the TCEQ rules with respect to required wastewater treatment capacities changed after the creation application had been submitted. Proposal for Decision at 17-18. Even if the cost of constructing the wastewater treatment plant as originally shown in the creation application is compared to the cost of constructing a plant sized in accordance with the new rules, the additional cost is a fraction of the overall cost of the facilities to be constructed by

the District and is quantified in the record through Wylie's own cross examination of Applicant's witness. Hearing Transcript at 62. As the Proposal for Decision concluded, even if this increased cost is taken into account, it results in only a marginal increase in the total tax rate proposed for the District, and the resulting total tax rate is still well below the maximum allowed by the TCEQ's feasibility rules. Proposal for Decision at 18-19.

The Proposal for Decision also correctly found that "Wylie does not have the ability to provide wastewater service to the District as a whole or even to the land within its [extraterritorial jurisdiction]." Proposal for Decision at 14. As discussed in detail in Applicant's Closing Argument, the record does not show whether Wylie has any treatment capacity whatsoever available in its Creekside Estates sewer line. Applicant's Closing Argument at 17. Even if Wylie does have some capacity available in that line, Wylie's own witness conceded that it was specifically constructed to serve an area that does not include the District. Hearing Transcript at 136-37. Moreover, Wylie has not agreed to provide service to any portion of the District and in fact has never even contemplated doing so. As the Administrative Law Judge found, Applicant petitioned Wylie for service in accordance with Section 42.042 of the Texas Local Government Code, and Wylie failed to respond. Proposal for Decision at 15. Both of Wylie's witnesses testified repeatedly that only the Wylie City Council can approve the provision of sewer service to the area within the District, and the City Council has never even considered the issue. Applicant's Closing Argument at 17, Applicant's Response to City of Wylie's Closing Argument at 5. Wylie itself admits as much in its exceptions. City of Wylie's Exceptions to Proposal for Decision [hereinafter "Wylie Exceptions"] at 2.

Wylie erroneously claims that "[w]hile a petition for service was provided, such is distinguished in the law from an application for service. The City is not required to act on a

request for service.” Wylie Exceptions at 3. Wylie does not identify any law that supposedly makes that distinction. In fact, the applicable law, Section 42.042 of the Local Government Code, does specifically require a city to act on a petition for service such as the one submitted by Applicant to Wylie or else have the failure to act deemed as consent to the creation of a district. *See* Applicant’s Closing Argument at 2-3. The record clearly shows that Wylie does not have the ability to provide sewer service nor has it made a legally binding commitment to provide service. Consequently, under Section 42.042(f) of the Local Government Code, the Commission must approve creation of the District. *See* Proposal for Decision at 14-15. Furthermore, as stated in the Proposal for Decision, Wylie does not propose to provide water or drainage services to the area within the District and does not suggest how those services will be provided in the absence of the District. *Id.* at 14.

As discussed in detail in Applicant’s previous briefs, the record evidence conclusively shows that there is a public need for the District and that the District will further the public welfare in accordance with Chapter 51 of the Texas Water Code. Applicant’s Closing Argument at 19-21, Applicant’s Response to City of Wylie’s Closing Argument at 3-5; *see also* Proposal for Decision at 8-10. Wylie’s exceptions ignore the analysis in the Proposal for Decision and offer no basis to refute it. Wylie even continues to cite *State Banking Board v. First State Bank of Gainesville*, 618 S.W.2d 905 (Tex. Civ. App.—Austin 1981, no writ), but does not address the Administrative Law Judge’s analysis of that case finding that it actually *supports* creation of the District in this instance. Proposal for Decision at 8-9. Wylie also again makes the desperate and rather mind-boggling assertion that the land in the District should be served by hundreds of individual septic tanks instead of a central wastewater treatment plant permitted and regulated by TCEQ. Wylie Exceptions at 4. Such a scenario certainly would not further the public welfare in

general, and it would also seem to be against the interest of a city that originally claimed to be concerned about water quality. Applicant supports the analysis in the Proposal for Decision and the findings in the proposed Order concerning the issues of public necessity and public welfare.

Finally, as to the transcript costs, Wylie is not being “penalized” for participating in the hearing. Wylie Exceptions at 5. The TCEQ rules specifically contemplate that transcript costs may be allocated among the parties and establish criteria for determining when it is appropriate to do so. The Administrative Law Judge correctly found that under those criteria, a portion of the transcript costs in this case should be allocated to Wylie. Proposal for Decision at 20.

II. EXECUTIVE DIRECTOR

Applicant does not oppose the exceptions filed by the TCEQ Executive Director. Applicant would note that while Chapter 51 of the Water Code refers to a “petition” for creation of a water control and improvement district (“WCID”), the TCEQ rules do refer to “applications” for district creation. *See* 30 Texas Admin. Code §§ 293.11(a), (c). Under the TCEQ rules, the creation “petition” required by Chapter 51 of the Water Code is one item required to be included in an “application” for creation of a WCID. *See Id.* §§ 293.11(c)(1). Therefore, the use of the term “application” in the proposed Order is not necessarily incorrect. As a practical matter, the two terms are sometimes used interchangeably.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Applicant urges the Commission to approve the creation of Collin County Water Control and Improvement District No. 3; overrule the City of Wylie’s objections; and issue the Administrative Law Judge’s proposed Order with the changes requested by the TCEQ Executive Director. Applicant also requests that the following be added at the end of Ordering Provision No. 1: “The District shall be composed of

the area described by metes and bound in Exhibit "A" attached hereto."¹ A copy of the proposed Exhibit "A" is attached; it is the same legal description included in the creation application.

Respectfully submitted,

COATS, ROSE, YALE, RYMAN & LEE, P.C.

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¹ Applicant did not receive the Proposal for Decision until December 31, 2010, the day after exceptions were due, and therefore did not have an opportunity to file exceptions. Applicant would again emphasize that it supports the Proposal for Decision and the proposed Order, with the minor revisions discussed herein, and does not request any change to the schedule.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on this 10th day of January, 2011 on the following:

The Honorable Kerrie Jo Qualtrough
Administrative Law Judge
State Office of Administrative Hearings
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Austin, Texas 78701
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Angela M. Stepherson

EXHIBIT A

LEGAL DESCRIPTION 592.744 ACRES

BEING A 592.744 ACRE TRACT OF LAND SITUATED IN THE LEROY FARMER SURVEY, ABSTRACT NO. 334, THE MARK MORRIS SURVEY, ABSTRACT NO. 561, THE ORPHA SHELBY SURVEY, ABSTRACT NO. 799, AND THE JOSIAH TURNHAM SURVEY, ABSTRACT NO. 919, COLLIN COUNTY, TEXAS, AND BEING ALL OF A CALLED 592.9988 ACRE TRACT OF LAND, DESCRIBED IN TRUSTEES DEED TO W.W. CARUTH, JR. AS RECORDED IN VOLUME 2684, PAGE 944, LAND RECORDS, COLLIN COUNTY, TEXAS, AS AFFECTED BY LAST WILL AND TESTAMENT OF W.W. CARUTH, JR. AS RECORDED IN COUNTY CLERKS FILE NO. 92-0054539 REAL PROPERTY RECORDS OF COLLIN COUNTY, TEXAS, SAID 592.744 ACRE TRACT WITH BEARING BASIS BEING GRID NORTH, TEXAS STATE PLANE COORDINATES, NORTH CENTRAL ZONE, NAD83, BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING AT A 3/4 INCH IRON ROD FOUND IN THE SOUTH LINE OF A 164.68 ACRE TRACT OF LAND DESCRIBED IN A DEED TO CONSOLIDATED PARTNERSHIP, LTD. AS RECORDED IN VOLUME 3433, PAGE 874, LAND RECORDS, COLLIN COUNTY, TEXAS;

THENCE, NORTH 89 DEGREES 12 MINUTES 19 SECONDS EAST, ALONG THE SOUTH LINE OF SAID 164.68 ACRE TRACT, A DISTANCE OF 3004.80 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-26" FOUND IN THE WEST LINE OF A TRACT OF LAND DESCRIBED IN A DEED TO THE UNITED STATES OF AMERICA AS RECORDED IN VOLUME 736, PAGE 833, DEED RECORDS, COLLIN COUNTY, TEXAS;

THENCE, ALONG THE WEST LINES OF SAID UNITED STATES OF AMERICA TRACT, THE FOLLOWING COURSES AND DISTANCES:

SOUTH 04 DEGREES 22 MINUTES 22 SECONDS EAST, A DISTANCE OF 756.97 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-25" FOUND FOR CORNER;

NORTH 65 DEGREES 28 MINUTES 27 SECONDS WEST, A DISTANCE OF 833.99 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET FOR CORNER;

SOUTH 00 DEGREES 26 MINUTES 51 SECONDS WEST, A DISTANCE OF 549.35 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-23" FOUND FOR CORNER;

SOUTH 69 DEGREES 55 MINUTES 58 SECONDS WEST, A DISTANCE OF 1077.15 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-22" FOUND FOR CORNER;

SOUTH 50 DEGREES 39 MINUTES 17 SECONDS WEST, A DISTANCE OF 1405.27 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-21" FOUND FOR CORNER;

SOUTH 08 DEGREES 18 MINUTES 33 SECONDS EAST, A DISTANCE OF 73.65 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-20" FOUND FOR CORNER;

NORTH 88 DEGREES 26 MINUTES 57 SECONDS EAST, A DISTANCE OF 2464.68 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-19" FOUND FOR CORNER;

SOUTH 28 DEGREES 47 MINUTES 08 SECONDS WEST, A DISTANCE OF 2603.00 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-18" FOUND FOR CORNER;

SOUTH 89 DEGREES 28 MINUTES 49 SECONDS EAST, A DISTANCE OF 573.44 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET FOR CORNER;

NORTH 49 DEGREES 05 MINUTES 38 SECONDS EAST, A DISTANCE OF 1752.84 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-16" FOUND FOR CORNER;

NORTH 61 DEGREES 25 MINUTES 18 SECONDS EAST, A DISTANCE OF 1093.35 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-15" FOUND FOR CORNER;

SOUTH 33 DEGREES 36 MINUTES 41 SECONDS EAST, A DISTANCE OF 1419.53 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-14" FOUND FOR CORNER;

SOUTH 65 DEGREES 00 MINUTES 17 SECONDS EAST, A DISTANCE OF 651.14 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-13" FOUND FOR CORNER;

SOUTH 43 DEGREES 36 MINUTES 57 SECONDS WEST, A DISTANCE OF 470.76 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-12" FOUND FOR CORNER;

NORTH 76 DEGREES 43 MINUTES 10 SECONDS WEST, A DISTANCE OF 1056.25 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-11" FOUND FOR CORNER;

SOUTH 29 DEGREES 18 MINUTES 01 SECOND WEST, A DISTANCE OF 903.25 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-10" FOUND FOR CORNER;

NORTH 78 DEGREES 51 MINUTES 09 SECONDS EAST, A DISTANCE OF 757.78 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-9" FOUND FOR CORNER;

SOUTH 06 DEGREES 19 MINUTES 32 SECONDS WEST, A DISTANCE OF 907.25 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-8" FOUND FOR CORNER;

SOUTH 75 DEGREES 00 MINUTES 06 SECONDS EAST, A DISTANCE OF 63.77 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-7" FOUND FOR CORNER;

NORTH 64 DEGREES 41 MINUTES 43 SECONDS EAST, A DISTANCE OF 806.05 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-6" FOUND FOR CORNER;

SOUTH 33 DEGREES 12 MINUTES 35 SECONDS EAST, A DISTANCE OF 297.17 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-5" FOUND FOR CORNER;

NORTH 83 DEGREES 36 MINUTES 01 SECOND EAST, A DISTANCE OF 255.23 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-4" FOUND FOR CORNER;

NORTH 41 DEGREES 14 MINUTES 52 SECONDS EAST, A DISTANCE OF 367.27 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-3" FOUND FOR CORNER;

NORTH 76 DEGREES 45 MINUTES 34 SECONDS EAST, A DISTANCE OF 1317.38 FEET TO A CORPS OF ENGINEERS MONUMENT STAMPED "4424-2" FOUND FOR CORNER;

SOUTH 10 DEGREES 01 MINUTE 29 SECONDS WEST, A DISTANCE OF 600.79 FEET TO A 5 CORPS OF ENGINEERS MONUMENT STAMPED "4424-1" FOUND FOR CORNER;

SOUTH 65 DEGREES 03 MINUTES 22 SECONDS WEST, A DISTANCE OF 1718.75 FEET TO A CORPS OF ENGINEERS MONUMENT FOUND AT THE MOST NORTHERLY NORTHEAST CORNER OF A 19.338 ACRE TRACT OF LAND DESCRIBED AS TRACT B IN A DEED TO H. STEVEN HUFSTETLER AS RECORDED IN COLLIN COUNTY CLERK'S FILE NO. 93-0088439, LAND RECORDS, COLLIN COUNTY, TEXAS;

THENCE, NORTH 89 DEGREES 21 MINUTES 35 SECONDS WEST, ALONG THE NORTH LINE OF SAID TRACT B AND A 19.338 ACRE TRACT OF LAND DESCRIBED AS TRACT A IN A DEED TO H. STEVEN HUFSTETLER AS RECORDED IN COLLIN COUNTY CLERK'S FILE NO. 93-0088439, LAND RECORDS, COLLIN COUNTY, TEXAS, A DISTANCE OF 649.87 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET FOR CORNER;

THENCE, SOUTH 00 DEGREES 17 MINUTES 42 SECONDS EAST, ALONG THE WEST LINE OF SAID TRACT A, A DISTANCE OF 1309.73 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET FOR CORNER;

THENCE, NORTH 89 DEGREES 30 MINUTES 12 SECONDS WEST, A DISTANCE OF 299.40 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET FOR CORNER;

THENCE, SOUTH 00 DEGREES 26 MINUTES 33 SECONDS EAST, A DISTANCE OF 285.89 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET ON THE NORTH RIGHT-OF-WAY LINE OF ST. PAUL ROAD;

THENCE, SOUTH 89 DEGREES 41 MINUTES 31 SECONDS WEST, ALONG THE NORTH RIGHT-OF-WAY LINE OF SAID ST. PAUL ROAD, A DISTANCE OF 1790.28 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET FOR CORNER;

THENCE, SOUTH 00 DEGREES 51 MINUTES 52 SECONDS EAST, A DISTANCE OF 4.00 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET ON THE NORTH RIGHT-OF-WAY LINE OF F.M. 2514 (PARKER ROAD);

THENCE, SOUTH 89 DEGREES 08 MINUTES 08 SECONDS WEST, ALONG THE NORTH RIGHT-OF-WAY LINE OF SAID F.M. 2514, A DISTANCE OF 1571.30 FEET TO A 5/8" IRON ROD WITH YELLOW PLASTIC CAP STAMPED "CARTER & BURGESS" SET AT THE BEGINNING OF A CORNER-CLIP BETWEEN THE NORTH RIGHT-OF-WAY LINE OF SAID F.M. 2514 AND THE EAST RIGHT-OF-WAY LINE OF AZTEC TRAIL;

THENCE, NORTH 44 DEGREES 56 MINUTES 54 SECONDS WEST, ALONG SAID CORNER-CLIP, A DISTANCE OF 41.22 FEET TO A WOODEN MONUMENT FOUND ON THE EAST RIGHT-OF-WAY LINE OF SAID AZTEC TRAIL;

THENCE, NORTH 01 DEGREE 30 MINUTES 56 SECONDS WEST, ALONG THE EAST RIGHT-OF-WAY LINE OF SAID AZTEC TRAIL, A DISTANCE OF 1822.87 FEET TO A 5/8" IRON ROD FOUND AT THE SOUTHEAST CORNER OF A 10.00 ACRE TRACT OF LAND DESCRIBED IN A DEED TO NORMAN R. MORROW AND WIFE, LUZIA M. MORROW AS RECORDED IN VOLUME 1531, PAGE 279, LAND RECORDS, COLLIN COUNTY, TEXAS;

THENCE, NORTH 00 DEGREES 09 MINUTES 24 SECONDS WEST, ALONG THE EAST LINE OF SAID 10.00 ACRE TRACT AND THE EAST LINE OF A 41.391 ACRE TRACT OF LAND DESCRIBED IN A DEED TO EDWARD H. HOBBS AS RECORDED IN VOLUME 4191, PAGE 715, LAND RECORDS, COLLIN COUNTY, TEXAS, A DISTANCE OF 1886.05 FEET TO A 1" IRON ROD FOUND AT THE NORTHEAST CORNER OF SAID 41.391 ACRE TRACT;

THENCE, SOUTH 89 DEGREES 14 MINUTES 23 SECONDS WEST, ALONG THE NORTH LINE OF SAID 41.391 ACRE TRACT OF LAND, A DISTANCE OF 1111.20 FEET TO A 5/8" IRON ROD FOUND FOR CORNER;

THENCE, NORTH 01 DEGREE 00 MINUTES 20 SECONDS WEST, A DISTANCE OF 4428.92 FEET TO THE **POINT OF BEGINNING** AND CONTAINING 592.744 ACRES OF LAND, MORE OR LESS.